

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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TODD SCOTT,

Petitioner,

97 CV 2411 (SJ)

- against -

MEMORANDUM AND  
ORDER

DANIEL SENKOWSKI, Superintendent  
of Clinton Correctional Facility,

Respondent.

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A P P E A R A N C E S:

TODD SCOTT  
I.D.# 89-A-8015  
Clinton Correctional Facility  
P.O. Box 2001  
Dannemora, NY 12929  
Petitioner, Pro Se

RICHARD A. BROWN  
Queens County District Attorney  
125-01 Queens Boulevard  
Kew Gardens, NY 11415  
By: John M. Castellano, Esq.  
Assistant District Attorney  
Attorneys for Respondent

JOHNSON, District Judge:

Todd Scott ("Petitioner" or "Scott") has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner believes his state court conviction should be reversed because (1) the trial court improperly denied his challenges for cause during voir dire; (2) the prosecutor used race as a criterion in jury

selection; (3) the Department of Corrections lost photographs taken of him shortly after his arrest; (4) the prosecutor prejudiced Petitioner by making improper remarks in his opening and closing statements; (5) the trial court deprived him of due process by adversely deciding his pretrial motion pursuant to People v. Sandoval, 34 N.Y.2d 371 (1974), by denigrating counsel, and by unfairly marshaling the evidence; and (6) the trial court should have suppressed his custodial statements. Respondent moves to dismiss the petition as time-barred. For the reasons stated below, the petition is dismissed.<sup>1</sup>

### **BACKGROUND**

In the early morning hours of February 26, 1988, Petitioner and two others approached the patrol car of rookie police officer Edward Byrne, who had been assigned to protect the home of a witness in an arson case. Officer Byrne was shot five times in the head from a distance of two feet and died instantly. Petitioner was arrested four days later hiding in the closet of a friend's apartment. Petitioner made a videotaped statement placing himself at the scene of the crime. Trial testimony established that on the evening before the murder, Petitioner told his cohorts that "the boss" of a local drug organization ordered the "hit" and that they would each receive \$8,000.

On June 6, 1989, Petitioner was convicted of Murder in the Second Degree

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<sup>1</sup> Rule 4 of the Rules Governing Section 2254 Cases for the United States District Courts permits a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

(N.Y. Penal Law § 125.25[1]) and Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03). He was sentenced to twenty-five years to life on the murder conviction and five to fifteen years on the weapons conviction. Petitioner appealed his conviction to the New York Supreme Court, Appellate Division, Second Department (“Appellate Division”). On October 18, 1993, the Appellate Division unanimously affirmed Petitioner’s conviction. People v. Scott, 197 A.D.2d 644 (2d Dept. 1993). The court held that Petitioner’s challenge to his confession on state constitutional grounds was without merit, Petitioner’s challenges for cause to certain jurors during voir dire were properly denied, and the prosecutor had not used race as a criterion in jury selection.

Petitioner sought leave to appeal his conviction to the New York Court of Appeals. On December 3, 1993, Petitioner’s application for leave to appeal was denied. People v. Scott, 82 N.Y.2d 903 (1993). Petitioner did not seek a writ of certiorari from the United States Supreme Court nor did he file any other motions after his direct appeal was completed. Thereafter, the instant motion was filed on April 28, 1997.

### **DISCUSSION**

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),<sup>2</sup> which became effective on April 24, 1996, significantly amended 28 U.S.C. §§ 2244, 2253, 2254 and 2255. As a result, 28 U.S.C § 2244(d)(1) now provides that federal habeas

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<sup>2</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).

petitions challenging a judgment of a state court are subject to a one-year statute of limitations.<sup>3</sup> The limitation period, with certain exceptions, begins to run either after the completion of direct review of the judgment by the state courts or upon the expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1). However, Congress did not provide specific guidelines regarding the retroactivity of this provision, thereby leaving the resolution of that issue to the courts. The Court of Appeals of the Second Circuit has held that in cases where, as here, the judgment of conviction became final before the effective date of the AEDPA, the habeas petition

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<sup>3</sup> 28 U.S.C. § 2244(d)(1) states:

(1) a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

may be filed outside the one-year period but within a “reasonable time” after April 24, 1996. See Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997). Yet, it declined to set forth a precise definition of “reasonable time.”

In Peterson, the court held that the petitioner’s filing of his petition seventy-two days after the effective date of the AEDPA was timely. Id. at 93. However, the court stated that “where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition,” it saw no need to accord a full year after the effective date of the AEDPA. Id. at 93. Further, the court cautioned that the reasonable time alternative should not be applied with undue rigor. Id.

In order to analyze the effect of the AEDPA on the instant case, it is necessary to reiterate the dates of the relevant events. As set forth above, Petitioner’s state court conviction became final on December 3, 1993, when the New York Court of Appeals denied Petitioner leave to appeal. Petitioner did not file any collateral motions. Scott’s current habeas petition was filed on April 20, 1997,<sup>4</sup> over three years and four months after the completion of his direct appeal and almost one year after the effective date of the AEDPA.

Petitioner has had over three years to contemplate bringing a federal habeas corpus petition. However, he neglected to do so. This Court notes that in this case,

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<sup>4</sup> Where a prisoner is proceeding pro se, he is deemed to have filed his application when it is delivered to prison officials. Houston v. Lack, 487 U.S. 266, 273 (1988).

Petitioner filed his petition almost one year after the effective date of the AEDPA and more than three years after his direct appeal was complete. Thus, the Court finds that Scott's petition was not filed within a reasonable time as contemplated in Peterson. Accordingly, the Court hereby dismisses the petition as time-barred. See Clark v. Greiner, 97 CV 2483 (E.D.N.Y. July 10, 1997) (habeas petition dismissed as untimely where it was filed over one and one-half years after conviction became final and eleven months and two and one-half weeks after enactment of the AEDPA); Smith v. Stinson, 97 CV 1935 (E.D.N.Y. June 30, 1997) (finding untimely a petition filed more than two years after conviction became final and eleven months and three weeks after enactment of the AEDPA); Calderon v. Artuz, 97 CV 1965 (E.D.N.Y. June 25, 1997) (dismissing petition filed eleven months and three weeks after the effective date of the AEDPA and over four and one-half years after the state court judgment as untimely); DeChirico v. Walker, 97 CV 1456 (E.D.N.Y. June 12, 1997) (finding petition filed almost eleven months after the effective date of the AEDPA, and over four years after his judgment of conviction became final was untimely); Oppenheimer v. Kelly, 1997 WL 362216 (S.D.N.Y. 1997) (stating that filing 350 days after the effective date of the AEDPA is unreasonable); Zebrowski v. Keane, 1997 WL 436820 (N.D.N.Y. 1997) (concluding that petition filed more than three years after judgment of conviction became final and more than one year after the effective date of the AEDPA was not timely); Berger v. Stinson, 1997 WL 535227 (W.D.N.Y. 1997) (dismissing petition filed eight days short

of a full year after the AEDPA became effective and where the underlying conviction occurred more than a decade ago as time-barred). But see Rivalta v. Artuz, 1997 WL 401819 (S.D.N.Y. 1997) (finding a petition filed six months after the effective date of the AEDPA was timely).


Given that the petition is time-barred, the merits of Petitioner's claims shall not be addressed. In addition, this Court declines to issue a certificate of appealability, as Petitioner has not presented a "substantial showing of the denial of a constitutional right." See Nelson v. Walker, 121 F.3d 828, 832 n.3 (2d Cir. 1997).

#### CONCLUSION

For the reasons set forth above, Scott's petition for a writ of habeas corpus is dismissed.

SO ORDERED.

Dated: May 1, 1998  
Brooklyn, New York

  
U.S.D.J.